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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 203

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

CONTINENTAL OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 17, 1959 (App. 28a), affirming the order of Respondent Federal Power Commission[1] entered in Docket G-5346 against Continental[2] insofar as said order directed issuance of a certificate of public convenience and necessity for a production facility, i.e., portion of the christmas tree assemblage of Continental on a certain gas well located in Lea County, New Mexico, upon the holding that such christmas tree assemblage also constituted a sale facility.

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[1] Respondent Federal Power Commission will be referred to as *Commission;* Petitioner Continental Oil Company will be referred to as *Continental;* the Natural Gas Act will be referred to as the *Act.*

[2] The record certified from the Court below will be referred to as *R;* the Appendix to this Petition as *App.*

OPINIONS BELOW

The Commission issued an order (R. 161, App. 41a) reversing the initial decision by the Presiding Examiner issued May 1, 1957 (R. 154, App. 34a). The majority and dissenting opinions in the Court of Appeals rendered April 17, 1959, are reported in 266 F. 2d 208, and set forth in the Appendix hereto (App. 1a, 9a).

JURISDICTION

The judgment of the Court of Appeals was entered April 17, 1959 (App. 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1), and the Natural Gas Act, § 19(b).

QUESTIONS PRESENTED

1.

Where an independent producer makes a well-head sale of natural gas admittedly subject to the jurisdiction of the Federal Power Commission, does Section 7(c) of the Natural Gas Act: (a) require the Commission in issuing a certificate of public convenience and necessity for such sale, to conjoin in such certificate one covering some physical facility, and (b) empower the Commission, where such producer neither has nor operates any physical facility for such sale, to certificate a physical facility of production as though it were a sale facility despite the express provisions of Section 1(b) of the Act denying and prohibiting Commission jurisdiction over all production facilities?

2.

In a review pursuant to Section 19(b) of the Natural Gas Act, is the United States Court of Appeals author-

ized, as basis for its decision, to make its own independent finding different from, and contrary to, that which the Federal Power Commission made the basis of its decision where the judicial finding is unsupported by and contrary to the undisputed evidence in the record?

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821, as amended, 15 U.S.C. § 717, et seq.) are set forth in the Appendix filed herewith (App. 29a-33a).

STATEMENT

(a) The Proceedings before the Federal Power Commission.

On November 29, 1954 (R. 142) under compulsion of Commission Order 174-A (19 Fed. Reg. 7081), Continental filed (involuntarily under protest) an application for a certificate of public convenience and necessity covering well-head sale of dry natural gas to El Paso Natural Gas Company (El Paso) from a well in Lea County, New Mexico. It prayed that jurisdiction be disclaimed. Simultaneously, Continental petitioned for declaratory order of non-jurisdiction (R. 149).

After a hearing, participated in only by Continental and the Commission Staff, the Presiding Examiner issued his decision (R. 154) dismissing the application for lack of jurisdiction; adjudging that such sale was not one in interstate commerce;[1] and that none of Continental's facilities were facilities for sale or transportation of gas in interstate commerce. On the latter point the examiner said:

---

[1] After appeal, Continental withdrew its objection to Commission jurisdiction over the sale, and conceded such sale to be subject to Commission jurisdiction.

"(4) The facilities owned by Continental are not facilities for the sale or transportation of gas in interstate commerce. No provision of the Natural Gas Act requires Continental to apply for or obtain a certificate of public convenience and necessity authorizing the drilling of a gas well, the installation of the well-casing, the casing head, the bleeder valve, the master valves or any of the facilities owned by Continental as part of the well here involved. No case decided by any Court, and no decision or order of this Commission has been cited or found that requires the certification of the sale or of the facilities here involved. Continental engages in no transportation of the gas here involved. Movement of gas in a gas well is not transportation of gas." (R. 160).

The Examiner (R. 156) noted that none of Continental's evidence was controverted; that the Staff introduced no evidence. "Hence", the Examiner declared, "these undisputed facts [substantial, we think] are enumerated as necessary findings of fact *being conclusive*[4] by reason of being the *exclusive evidence of record*." (Footnote 4, R. 156).

Sustaining the Staff's exceptions to the Examiner's decision (Certified R. 172-182),[5] the Commission reversed

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[4] All emphasis supplied by writer unless otherwise noted.

[5] These exceptions were a part of the record certified by the Commission to the Court below but were not designated by the Staff for inclusion and printing in the Joint Appendix. This sentence from Staff's exceptions fairly epitomizes its position on facilities: "It cannot be successfully contended that the sale in this instance can be effectuated without aid of applicant's (Continental's) facilities here involved." (Certified R. 180). Reliance was laid on *Huber Corporation* v. *Federal Power Commission* (1956, 3 Cir.) 236 F. 2d 550, cert. den. 352 U.S. 971; *Saturn Oil & Gas Co.* v. *Federal Power Commission* (1957, 10 Cir.) 250 F. 2d 61, cert. den. 355 U.S. 956, and *Hartford Electric Light Co.* v. *Federal Power Commission* (1942, 2 Cir.) 131 F. 2d 953, cert. den. 319 U.S. 741. Such cases were also relied on by the Court below (Fn. 4, App. 5a, App. 8a) and are discussed hereafter.

(R. 161). It concluded that such sale was jurisdictional so that a certificate of public convenience and necessity "authorizing such sale" should issue (R. 166).

It adopted Staff's views that even though the christmas tree was a facility of production, it could also be termed a facility of sale, because it aided or promoted effectuation of the sale. Said the Commission:

> "* * * it is apparent that such portions of the 'Christmas tree' that are owned by Continental and serve to contain the gas at the point of delivery are facilities for effecting the sale of gas in interstate commerce, *regardless whether they serve also to effect production. Saturn Oil & Gas Company, supra.* (Italics by the Commission) 'Agere sequitur esse' says the logic primer: What a thing is is determined by what it does. It cannot reasonably be contended that the sale in this instance can be effectuated without the aid of Continental's facilities herein involved." (R. 167-8).

It then declared that an interstate sale could be made "only by means of interstate selling facilities" (R. 168), which had to be *certificated.*

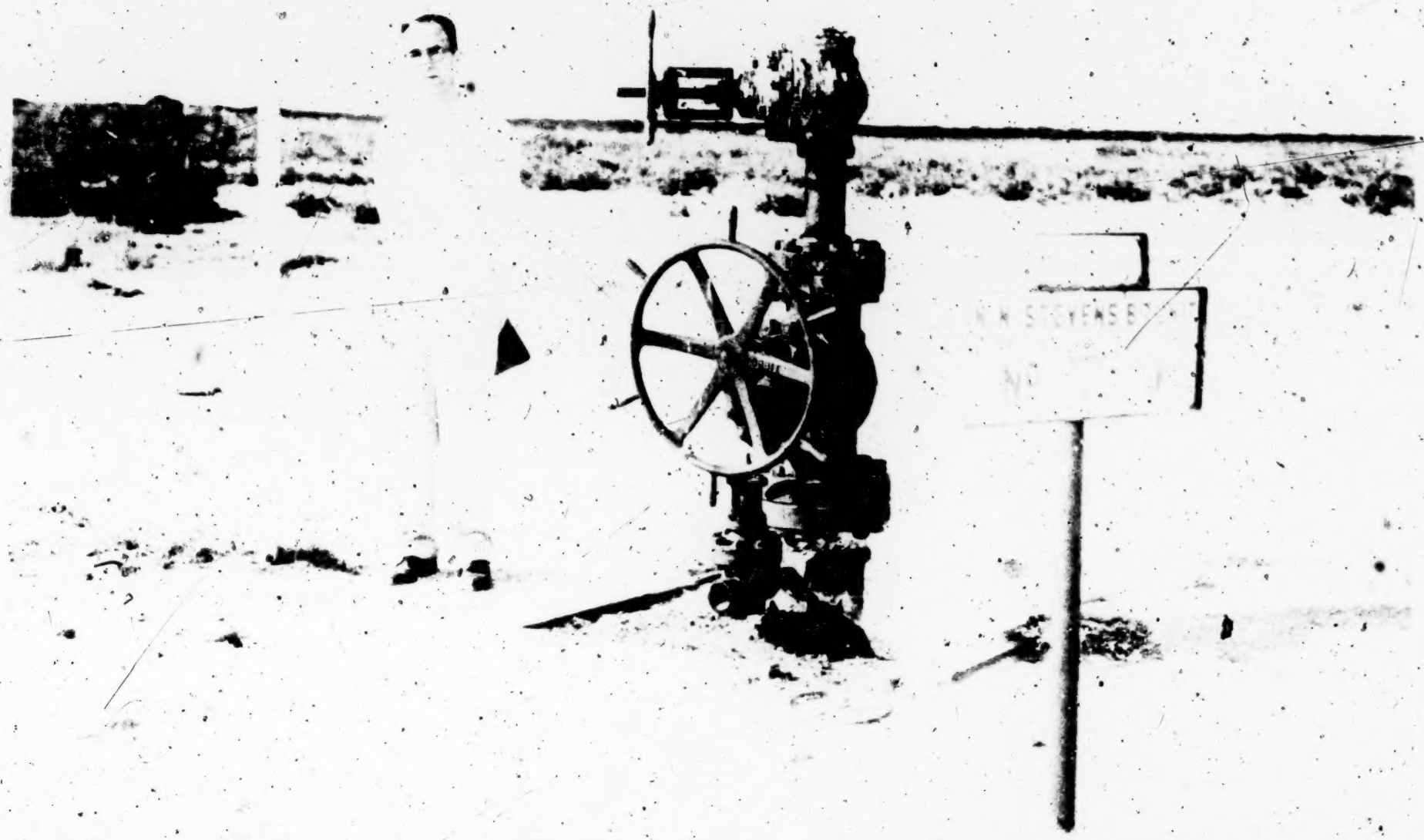
Commissioner Digby concurred in that part of the order granting a certificate *for the sale;* but objected to issuance of a certificate "for the facilities of the independent producer or gatherer of gas" (R. 173-4). In his view, in our submission correct, the issue was whether the Act required certification of facilities in conjunction with issuance of a certificate authorizing the sale, suggesting that where construction of facilities was necessary to effect the sale, it was then subject to certification, but that power was denied the Commission either to compel construction or to certificate a producer's facilities.

Continental filed an application for rehearing specifying errors on the question of facilities (#16, 18-19 (R. 184); #20-34, 37-48 (R. 197-203); #53 (R. 219)) which the Commission denied (R. 226).

Attached is a photograph (Ex. 3) of the Stephens B-7, Unit No. 1 Well involved herein (R. 101). The vertical black and silver installation is called a "Christmas tree". Continental owns and installed the portion colored black. The purchaser, El Paso, owns, installed and operates the portion colored white (R. 107). The picture reflects the following:

Between the ground and the bottom circular flange is the casinghead. The casinghead is bolted to the bottom flange of a 7" master valve (R. 101-2). The circular flange at the top of the 7" master valve is bolted to the bottom flange of a 4" master valve (R. 103-4). El Paso screwed a 4" x 2" reducing swage (colored white) for a depth of one inch in the top of Continental's 4" master valve (R. 104). The top of the swage screws into a tee from which the white horizontal line takes off, thence to run into the ground and connect ultimately with El Paso's pipeline facilities (R. 104-5).

Continental's two master valves are necessary to production of the gas. They were installed as an essential part of completion in January, 1949 (R. 105). The initial sale contract is dated June 23, 1949 (Ex. 1, R. 94). Thus the two master valves (colored black), stood for six months before a sale was made or delivery of gas commenced. They were not altered or changed because of the sale and remain today precisely as installed in the course of drilling and completion. In addition to their fundamental function with production, they served a safety function, for either could be closed while damage from wear and tear, always experienced, was repaired (R. 103).



Their installation and operation had nothing to do with any sale of such gas, for they would be installed and operated irrespective of sale, and serve no function or use to throttle or regulate volume of delivery or rate of flow. They are designed to be used wide open or fully closed (R. 106).

By the operation of its facilities, El Paso regulates and controls the flow and volume of gas delivered. It makes periodic reports thereon to Continental, which has nothing to do with such facilities (R. 110-11). Continental's two master valves have not been manipulated since sale of gas began in June 1949 (R. 112).

(b) The Judgment of the Court of Appeals.

Continental filed a petition for review pursuant to Section 19(b) of the Act to set aside the Commission's order. The Commission appeared in defense of its order.

In the Court of Appeals, Continental conceded that the sale was jurisdictional so that an authorizing certificate of public convenience and necessity should issue.

The only question submitted to the Court below was the authority of the Commission to issue a certificate pursuant to Section 7(c) of the Act covering only a facility of production in contravention of the express prohibition of Section 1(b) of the Act by the device of declaring that no sale could be made without some physical facility hence this "production facility" could also be named a "sale facility".

The Court of Appeals, Judges Tuttle and Jones concurring, affirmed the Commission (App. 1a). The Court erroneously reasoned that Section 7(c) required, in addition to a certificate authorizing the sale, a certificate authorizing facilities, and independently held, without supporting evidence but in the teeth of the uncontradicted record, that

some of Continental's facilities were used for such sale which were not facilities in the production of such gas. It ignored specific decisions of this Court, notably *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (1949) 337 U.S. 498, clearly defining facilities of production by which it should have been controlled. It seemed obsessed with stated lack of specificity of "facilities" in the Section 1(b) language, "or to the production or gathering of natural gas" which *Panhandle* (p. 504-5) had laid to rest. It read the Act divorced from word meanings prevailing in the industry regulated by the Act, substituting instead its own general idea of the meaning of "produce", "production", etc., used in the Act, rather than ascribing to them, as Congress obviously must have intended, their use and meaning in the industry.

Finally, it did not accept the Commission's stated rationale underlying its order, i. e., that an admitted facility of production could be pressed into service as a facility of sale because no sale could be effected without a facility therefor. Instead, it boldly proceeded to make its own independent finding, (without any support in, but against, the uncontradicted evidence in the record), that the record showed the existence of facilities "for the sale of the gas that are not facilities of production." (App. 5a).

It arbitrarily and without right utilized for that purpose the very facility (master valves of the Christmas tree) which the uncontradicted record showed to be a facility of production only, and which the Commission, equally arbitrarily and without right, said doubled in brass also as a sale facility. Section 19(b) of the Act vested the Court below only with the limited power to review whether there was substantial evidence to support the Commission's findings and whether the Commission's order was within the ambit of its statutory authority. This the Court abandoned,

assuming in its place to exercise original judicial power, which, in our respectful submission, was without warrant at the law.

Judge Brown filed a strong and articulate dissent (App. 9a). He reasoned, correctly we insist, that the Court's preoccupation with the omission of the word "facilities" from the production exclusion of Section 1(b) was in fact conclusively governed by the clear and emphatic holding of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (1949) 337 U.S. 498, 504-5, and that the Court's decision should have conformed thereto. Both as to the question of the proper and natural meaning of the production exclusion and, more importantly, of this Court's declarations in the same case sustaining the integrity of the absolute prohibitions on basic power in Section 1(b) over facilities of production, he pointed out that *Panhandle* merely served to gather together and illuminate the emphatic statements theretofore contained in *Interstate Natural Gas Company* v. *Federal Power Commission* (1947) 331 U.S. 682-690. See, too, *Phillips Petroleum Company* v. *Wisconsin* (1954) 347 U.S. at 678.

He pointed out the impermissibility of a finding made by the Court which had only the power to review. He suggested that the Court was passive to the invasion of Section 1(b), an action declared to be pursuant to Section 7(c), because it wrongly assimilated facilities to sale in total disregard of production. This proceeded, he said, from considering "the 'facilities' as co-extensive with the needs for delivery of sale wholly apart from consideration of production". This in turn led to the error of the Commission's view which the Court adopted, that any equipment required to contain gas at the point of delivery was necessarily a facility for such sale. The independent finding of the Court was further suggested as improper in that the Court re-

fused to determine the meaning of the statutory terms as they were understood in the industry, for which the statute was passed, relying, rather, on what the Court felt was ordinary, non-technical usage. This interpretation of "production" or "production facilities" in terms of non-industry connotation by the Court was declared to be portentous, for, Judge Brown reasoned, that if first the Court declared all of the facilities which permitted an effective production were also necessary to effectuate a sale, the prohibition of Section 1(b) was emasculated and destroyed since all of the pipe and casing in the hole and all other facilities used to drill and equip the well were then subject to certification and control by the Commission, because they were equally essential to effectuate sale as the Court viewed the interpretation of "production" or "production facilities" in terms of ordinary non-industry connotation. The Congressional purpose would be preserved and accomplished by application of the time honored rule of construing words in the terms of the business and industry to be regulated.

REASONS FOR GRANTING THE WRIT

This is the first case in which this Court has been called upon to consider whether Section 7(c) of the Natural Gas Act requires that a certificate of public convenience and necessity authorizing a sale subject to the jurisdiction of the Commission cannot be issued unless a physical facility also be certificated; and further whether such Section authorizes an invasion of the prohibited area of jurisdiction defined in Section 1(b) of the Act to supply the facility to certificate.

The rationale of the decision is that any facility which aids or promotes effectuation of sale is a sale facility requiring certification. This destroys the provisions of Section 1(b) prohibiting jurisdiction over production and gather-

ing, and the Commission thereby is granted full and unrestricted jurisdiction over every phase and incident of the activity of drilling and gathering. For all materials and equipment necessary to drill and complete a well can, in this view, be said to aid or promote effectuation of sale which cannot occur unless gas is successfully produced. The producer is, thus, deprived of the right to drill and equip as his judgment dictates. He is thrown between Scylla and Charybdis. On one hand, he would obey, at his peril, state regulations governing every step in drilling, equipping, operating and producing gas wells. On the other, he would be compelled at pain of harsh penalties to secure the express approval of the Federal Power Commission for each one of the identical activities. Not only is the Federal Power Commission not equipped or competent to so manipulate every such act of every producer, but exercise of power so to do would smother the producer in such fashion as substantially to interfere with drilling and to diminish the expectancy of consumers to gas supplies. If the decision below stands, Congress labored in vain in the enactment of the exclusionary provision of Section 1(b); and this Court's decisions which have jealously enforced and protected the integrity and vitality of Section 1(b) will have been reduced to nonsense.

The decision below, thus, squarely presents broad and highly important questions affecting the jurisdiction of the Commission, particularly within the prohibited area of Section 1(b). Petitioner accordingly submits that the Court of Appeals has decided important questions of Federal Law which have not been but should be settled by this Court, and has decided them in a way which will have such extreme effect on the administration of a vital Federal statute as to call for review by this Court.

The Court of Appeals has decided erroneously an issue of general importance which this Court has not settled, but should determine, in holding that Section 7(c) of the Natural Gas Act permits issuance of a certificate of public convenience and necessity authorizing a sale subject to its jurisdiction only when facilities therefor exist and are certificated at the same time, and that to accomplish such purpose such section authorizes certification of production facilities, notwithstandng Section 1(b).

The Misconception of Section 7(c). It is apparent the Court misconceived Section 7(c). It fell prisoner to the fallacy posed by the Commission that a sale could not be made without facilities of the producer, that since Section 7(c) required certification of the sale, it also authorized invasion of Section 1(b) to certificate an admitted production facility on the specious ground that any facility which aided "possession" or "control" or "containment" of gas made possible the sale. Escape from Section 1(b) is not won by judicial fiat declaring a facility of production to be one of sale only.

Section 7(c) is couched in the disjunctive. It prohibits a natural gas company from doing four things unless it has a certificate therefor:

> (1) Making a sale subject to Commission jurisdiction;
>
> (2) Constructing or extending any *facility for a sale* subject to Commission jurisdiction;
>
> (3) Acquiring any *facilities for a sale* subject to Commission jurisdiction;
>
> (4) Operating any *facilities* or extensions *for a sale* subject to Commission jurisdiction.

This language nowhere commands conjunction of sale with facility for sale. It prohibits a sale without a certifi-

cate. If the producer constructs, or acquires, or extends, or operates a facility for sale, then and only then must he have a certificate therefor.

Unquestionably what the public interest demanded and Congress intended was to delegate to the Commission power to control the price of a wholesale sale. Control of "sale" furnished control of "price". Price control of a well-head sale is neither assisted or hindered by the presence, or absence of facilities for sale. Facilities for sale owned and operated by the producer were brought under regulatory scrutiny, primarily to assist the convenience of regulation. There is nothing in the commercial world, in common sense, or in the language of the Act which requires erection of artificially contrived theories such as the Court advanced to establish a separate "sales facility" where there is none, or justifies the use of this contrivance as a spring board to vault regulatory control into "the forbidden area" of production facilities.

Statutory Words Reflect Meaning Understood in Industry Regulated. The Court went further astray in its effort to assimilate "possession" and "containment" with "sale". Indeed, it comes close to assimilating "production" to "sale".

If "production" be separated from the meaning in which Congress obviously intended to use it, the Court's "conceptual anomaly" does not go far enough. For "physically" and apart from industry usage, any effective escape from the reservoir in which nature imprisons gas constitutes production. Thus, when that reservoir is punctured, the gas, like air in a punctured automobile tire, rushes to the puncture point of low pressure. Its escape from that reservoir in this aspect is production.

The Court really means control. Control is as essential to production as to sale, for uncontrolled gas cannot be pro-

duced, nor delivered to any purchaser. Congress, writing Section 1(b), was familiar with this.

The Court ignored the fact that Congress, in passing the Act, used the terms "production", "sale", and other similar terms of industrial art in the same sense and context as the industry employed them. *Order of Railway Conductors* v. *Swan* (1947) 329 U.S. 520, 525; *O'Hara* v. *Luckenbach S.S. Co.* (1926) 269 U.S. 364, 370-1; *New Mexico* v. *United States Trust Company* (1898) 172 U.S. 171, 181; *Hoffman* v. *Palmer* (1942, 2 Cir.) 129 F. 2d 976, 984; affirmed 318 U.S. 109; *R. H. Johnson & Co.* v. *Securities & Exchange Commission* (1952, 2 Cir.) 198 F. 2d 690, 696, cert. den. 344 U.S. 855.

The industry considers gas to be produced when it passes beyond the christmas tree (R. 112-3). The Court should have respected this, and ruled accordingly.

The Warping of Production Facilities to Unnatural Use. Thus the Court was wrong in adopting the reasoning of the Commission that any equipment which permits production may also permit effectuation of a sale. As the dissent so graphically points out, this concept embraces everything from the surface to the producing horizon, the producing horizon itself, and the lease covering it, and hence would absorb into 7(c) the producing business in its entirety. This forces production facilities into an unnatural use.

Such a misconception creates no authority to exercise power not granted by the basic statute, but indeed denied by the express terms of Section 1(b). Section 7(c) must be so interpreted as reasonably to accommodate the clear and undoubted policy of Congress to steer clear of the functions and physical properti of production. Congress left them to local authority.

The Commission's position seems strange, for in its brief Amicus in *Cities Service Gas Company* v. *State Cor-*

poration Commission of Kansas (No. 83, October Term, 1957) it seemed to have learned the lesson of *Panhandle* (337 U.S. 498), saying:

> "Moreover, they [sales] are not exempted from regulation by the 'production or gathering' exception of Section 1(b) of the Act; this language refers only to physical facilities, properties and activities underlying the sales and does not affect the jurisdiction of the Power Commission over the sales themselves." (p. 17).

Panhandle Furnishes Guideposts Here. In truth, the Court had guideposts available which it should have followed. In our submission, *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company* (1949) 337 U.S. 498, lighted the way. Involved was freedom to convey leases which this Court termed "facilities of production." Equally so is the christmas tree here. *Panhandle* preserved intact the exclusions of Section 1(b). It (p. 503-5) is stony ground to the easy conclusion that these admitted production facilities are also sales facilities because they aid sale.

The claim that Section 7(c) grants power to swallow forbidden jurisdiction also is discredited. There (337 U.S. at 505) the Commission contended that 7(c), inter alia, showed Congressional intent "to confer a certain measure of authority upon the Commission over the production and gathering of gas." Emphatically the Court declared such section did "not even by implication" suggest regulatory extension "to cover incidents connected with production or gathering * * *" (p. 506). It concluded:

> "To accept these arguments springing from power to allow interstate service, fix rates, and control abandonment would establish wide control by the Federal Power Commission over the production and gathering of gas. It would invite expansion of power into other phases of the forbidden area. It would be an assumption

> of powers specifically denied the Commission by the words of the Act as explained in the report and on the floor of both houses of Congress. The legislative history of this Act is replete with evidence of the care taken by Congress to keep the power over the production and gathering of gas within the states." (p. 509).

But the Court turned its back on *Panhandle* and instead declared its holding to be consistent with *Saturn Oil & Gas Co.* v. *Federal Power Commission* (1957, 10 Cir.) 250 F. 2d 61, cert. den. 355 U.S. 956, and *Huber Corp.* v. *Federal Power Commission* (1956, 3 Cir.) 236 F. 2d 550, cert. den. 352 U.S. 971. We find this reliance as difficult to understand as the refusal to obey and follow the mandate of *Panhandle*. Neither decision supports the Court's position.

In *Saturn*, the Court stated the basic question presented was whether wellhead *sales* were jurisdictional under the Act. (250 F. 2d at 64).

On "facilities" the Court declared: "The record does not disclose any controversey as to whether any particular facility is within or without the jurisdiction of the Commission" (Ibid. p. 69). That sets *Saturn* completely apart from this case. The Court's discussion of Saturn's Fifth Amendment contention claimed to arise from failure specifically to identify jurisdictional facilities does not succor absence of issue of jurisdiction on which this case pivots.

Nor is *Huber* apposite. Huber owned and operated an extensive gathering system comprising approximately eight miles of pipeline, to which eleven wells were connected. Gathering was consummated at a central point at which Huber installed and operated a system of three block valves located in a gate valve box with downstream pipe lines, two to three feet long, through a third valve, to the purchaser's pipeline. (Opinion of Presiding Examiner, In the Matters of J. M. Huber Corporation, Docket Numbers G-3038 and

(R. 557). The Examiner found on the evidence that these three block-valves and pipelines down stream were installed and operated by Huber for the purpose of making the sale and moving the gas into Northern's facilities. Thereby Huber retained "absolute control of the volume of gas which moves to Northern" (Idem p. 15). The Court concurred (236 F. 2d at 552). Huber's facilities clearly were "sales" facilities.

The Court's effort to assimilate this case to *Huber* and *Saturn* fails; its reliance on them is misplaced and misconceived.

Uncontradicted Evidence Conclusive. The facts of *Saturn* and *Huber* present strong contrasts from those here. Here the uncontradicted evidence establishes Continental's christmas tree is solely and only a facility for production, and does not and cannot constitute a facility for sale. In such circumstances the Commission was not free to ignore such testimony. It should have heeded the declaration of the Examiner that such uncontradicted evidence was conclusive. Strangely enough, the Fifth Circuit has twice declared in ringing language that administrative agencies must honor uncontradicted evidence. *National Labor Relations Board* v. *Russell Mfg. Co.* (1951, 5 Cir.) 191 F. 2d 358, 360; *National Labor Relations Board* v. *Ray Smith Transport Co.* (1951, 5 Cir.) 193 F. 2d 142, 146; see, *International Shoe Co.* v. *Federal Trade Commission* (1930) 280 U.S. 291, 299.

The dissent aptly points out that failure of the Staff, being possessed of experts familiar with the issues here involved, to offer evidence in contradiction of that of Continental can only be construed as admission of correctness of such evidence.

No Judicial Power for Independent Finding. But the Court was equally without authority to make the finding

and holding it did. Section 19(b) of the Act gives the Court no authority save a review "limited to keeping the Commission within the bounds which Congress has created". *Colorado Interstate Gas Company* v. *Federal Power Commission* (1945) 324 U.S. 581, 589.

Thus the Court was without authority to make a finding as the cornerstone of its affirmance because thereby it exercised the Commission's powers and substituted its own judgment for the administrative decision, given exclusively to the Commission. *Federal Power Commission* v. *Hope Natural Gas Co.* (1944) 320 U.S. 591, 617-8; *Federal Power Commission* v. *Natural Gas Pipe Line Co.* (1942) 315 U.S. 575, 586; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.* (1951) 341 U.S. 246, 251-2.

This Court has decreed want of judicial power to consider issues, sua sponte, outside the scope of the motions and orders specified in Section 19 of the Act. *Federal Power Commission* v. *Colorado Interstate Gas Co.* (1955) 348 U.S. 492.

THE HOLDING BELOW PREVENTS COMPLIANCE WITH LOCAL REGULATION AND SUBJECTS PRODUCERS TO EXTREME PENALTIES.

The Court's discussion (App. 5a-6a) far from supporting its adjudication, sua sponte, that the top valve of the christmas tree is solely a sales facility, demonstrates to the contrary. It recognizes that both valves are essential production facilities installed as a safety measure to insure against blowouts and loss of control of the well, with consequent destruction of production. This is precisely what the uncontradicted evidence discloses (R. 13).

If the holding below stands, it will be disruptive of the oil and gas industry, and particularly of the right and freedom to drill wells. Indeed, producers will be presented with

Hobson's choice between strict state regulation designed to protect its natural resources and promote conservation, and tight federal regulation under the Act which will embrace the same activities.

Independent producers must be free to comply with obligatory local rules and regulations of conservation. The states, too, provide penalties for disobedience. Producers must not be hampered in taking such action as their experience, or the particular developing circumstances in connection with each well may urgently require. The problems and emergencies constantly arising during drilling and operation cannot, indeed, in nature will not, wait upon the ponderous, slow procedures of the Commission.

Yet, if the Commission be empowered to invade Section 1(b) and certificate production facilities upon the deceitful ground that they constitute sales facilities, Section 7(b) would prohibit the discontinuance of their use unless first authorized by the Commission. This would expose the producer to the overwhelming and harsh penalties of the Act with dire consequences both to the producer and the Act. *Ex parte Young* (1907) 209 U.S. 123.

The producer derives no reassurance from Section 21 language of "wilfully and knowingly", for if the radical and destructive policy of the decision below which splinters the barricade of Section 1(b) becomes the policy of the law, no action thereafter can be taken by the producer which will not be "wilfull and knowing". Nor can the Commission administer tranquilizers based upon declared intention, for if the decision below becomes the law, the Commission is obligated at all events to enforce it. It has not shirked seeking enforcement as *Panhandle* and *Huber* reflect.

CONCLUSION

We respectfully submit that this Court, as in *Panhandle*, should repulse the Commission's attempted raid into Section 1(b), undertaken to destroy and debilitate it in order to broaden and extend regulatory control and jurisdiction into the forbidden area. The answer bluntly proclaimed in *Connecticut Light and Power Co. v. Federal Power Commission* (1945) 324 U.S. 515, 528-9[*] needs repeating here:

> "it is hard for us to believe that Congress meant us to read 'shall have jurisdiction' where it had carefully written 'but shall not have jurisdiction'. The command 'thou shalt not' is usually rendered as to forbid and we think here it was employed without subtlety or contortion and in its usual sense" (p. 528-29).

Permitting the rule of the decision below to stand will foster an accumulation of administrative precedent which inevitably will provoke invocation of the familiar principle that continued administrative interpretation is entitled to serious and persuasive weight before the courts.

Continental agrees, and has admitted, that a certificate of public convenience and necessity properly should issue by the Commission covering its sale in this instance to El Paso because such *sale* is subject to the Commission's jurisdiction. Continental is equally convinced that the Commission has no jurisdiction over its production facilities and should not be allowed to beat down the prohibition of Section 1(b) thereby to assume jurisdiction over a production facility which the Act expressly provides it shall not exercise. Con-

[*] This decision expressly disapproved the holding of *Hartford Electric Light Co. v. Federal Power Commission* (see FN 5, p. 4, infra) relied on by the Commission and referred to in footnote 4 (App. 5a) of the Court's opinion below.

gress was explicit in excluding from Commission jurisdiction regulatory control over the facilities and incidents of production. Petitioner believes this Court should as emphatically preserve that Congressional intent by reversing the decision below which otherwise will allow the Commission to assume full jurisdiction over the whole spectrum of production.

Accordingly, it is urged that a writ of certiorari to review the judgment of the Court below should be granted.

Respectfully submitted,

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